

LEGISLATIVE AUDIT DIVISION

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MEMORANDUM

TO: Legislative Audit Committee Members
FROM: Angus Maciver, Deputy Legislative Auditor
CC: John Tubbs, Director, Department of Natural Resources and Conservation
Tim Davis, Administrator, Water Resources Division, Department of Natural Resources and Conservation
Arne Wick, Program Director, Reserved Water Rights Compact Commission
Chief Justice Mike McGrath, Montana Supreme Court
Russ McElyea, Chief Water Judge, Montana Water Court
DATE: November 2013
RE: Performance Audit Follow-Up 11SP-38: Water Rights Adjudication (09P-09)
ATTACHMENTS: Original Performance Audit Summary

Introduction

The *Water Rights Adjudication* (09P-09) audit report was issued to the Committee in June 2010. The audit included five recommendations made to the Department of Natural Resources and Conservation (DNRC), the Reserved Water Rights Compact Commission (RWRCC), and the Montana Water Court. We recently completed follow-up work to assess implementation of the report recommendations. This memorandum summarizes the results of our follow-up work.

Overview

Our original audit report addressed various aspects of the statewide adjudication of water rights, which has been in progress since the early 1970s. Findings and recommendations focused on the efforts of the three audited agencies to complete the adjudication process within the timeframes and other parameters established by the Legislature. We made five recommendations to the various executive and judicial branch agencies involved in the adjudication process. Audit follow-up work shows that DNRC, the RWRCC, and the Water Court are working together to implement all the audit recommendations.

Background

For the period between 1974 and 2020, the state could expend up to \$65 million for adjudication activities in DNRC, the RWRCC, and the Water Court. These activities consist of examination of around 220,000 individual water rights claims by DNRC, negotiation of compact agreements with 20 different federal agencies and Indian tribes by the RWRCC, and the processing of water users' objections through litigation at the Water Court. In 2005, the legislature passed House Bill (HB) 22, which provided additional resources to expedite examination and initial decree issuance and set deadlines for the process.

The changes made under HB22 were successful in moving the adjudication process forward. Audit work showed DNRC should meet the deadlines established for completion of claim examination and is likely to finish this phase of the adjudication before 2015. Our analysis also shows the Water Court should be able to complete the initial decree issuance phase prior to its 2020 statutory deadline. However, the litigation phase of the adjudication is likely to continue until 2028 or later. As the adjudication moves forward, several issues could impact progress. This includes the potential for re-examination of claims that were reviewed under the DNRC verification process. Further delays resulting from compact negotiations also had the potential to impact progress towards completing the adjudication. As remaining claims move into the litigation phase, the role of DNRC will diminish as the focus of the adjudication shifts to the Water Court. Because of the progress made on DNRC claims examination, the transition to the litigation phase and the eventual post-decree administration of water rights is happening sooner than anticipated.

Audit recommendations addressed alternative approaches to dealing with re-examination issues, coordination between different agencies involved in water compact negotiations, the need for defined expectations regarding management of the litigation phase of the adjudication, and planning for the transition to the post-adjudication era.

Follow-up Audit Results

Audit follow-up work involved interviews with key agency personnel at DNRC and the Water Court, and review of documentation relating to developments in the adjudication process over the past three years. The following sections summarize the progress toward implementation of the report recommendations.

RECOMMENDATION #1

We recommend the Water Court avoid further re-examination unless data supports a significant increase in accuracy that provides benefits to water users.

Implementation Status – Being Implemented

Since the release of the audit report, re-examination of claims has occurred on a limited basis under the direction of the Water Court, but the Water Court is generally avoiding re-examination efforts where there appears to be little benefit to water users. Specifically, in December 2012, the Water Court issued an order relating to limited system-based re-examination for certain basins (see Recommendation # 2 below). This order included reference to the performance audit findings and the process followed by the Water Court and DNRC to address the need for re-examination. In April 2013, this order was subject to requests from the United States Department of Justice for clarification of the terms of the re-examination to include an expansion of these efforts to address issues relating to non-use and abandonment. However, the Water Court denied the Justice Department's motion and is currently proceeding with only limited re-examination work.

The Water Court anticipates further issues regarding the status of verified claims could be raised during the objections and litigation phases for basins where decrees have been or will be issued over the next few years. As with the example cited above, the federal government and some tribal authorities have filed basin-wide objections for some decrees relating to alleged DNRC examination deficiencies. Although it is not possible to determine how the Water Court will rule on future requests for further re-examination, the series of orders recently issued by the Water Court suggest the broad parameters identified in this recommendation are being considered by the Water Court. These parameters include the involvement of DNRC staff in evaluating re-examination issues and the consideration of likely benefits to water users from conducting more examination work.

RECOMMENDATION #2

We recommend the Water Court and the Department of Natural Resources and Conservation address the status of verified claims by developing procedures for the application of system-based standards, and summary report preparation to certain verified claims.

Implementation Status – Implemented

As discussed relative to the first recommendation, the Water Court issued a series of orders in 2012 and 2013 addressing system-based re-examination procedures. These orders and the procedures they outline were the result of collaboration between the court and DNRC to identify and remedy existing weaknesses in past verification and examination efforts. Implementing systems-based standards for previously verified or examined claims is designed to improve the accuracy and consistency of the underlying water rights, without the considerable time and costs involved in a claim-by-claim or other more detailed re-examination effort.

RECOMMENDATION #3

We recommend the Reserved Water Rights Compact Commission and the Water Court coordinate their activities to ensure any further delays in decree issuance are considered on the basis of their effect on the statewide adjudication by:

- A. Considering only formal written requests for further delays, AND,**
- B. Reporting anticipated impacts on adjudication deadlines to the Environmental Quality Council, the Water Policy Interim Committee, and other interested parties.**

Implementation Status – Implemented

The RWRCC did not, as originally anticipated, sunset in July 2013. However, the status of the agency and of the remaining compacts has not resulted in further delays to the state-law based adjudication efforts. Discussions with the Water Court indicate no written requests for further delays in decree issuance have been received from the RWRCC and none are expected for the few remaining basins where no decree has been issued. In its response to our audit follow-up request, DNRC indicated the RWRCC does not intend to seek any further delays in decree issuance. The Water Court continues to provide the Water Policy Interim Committee with quarterly updates on decree issuance status. These updates include information that would identify any impacts on anticipated decree issuance timeframes resulting from future compact activities.

RECOMMENDATION #4

We recommend the Water Court develop and adopt defined expectations of performance for the litigation phase of the adjudication process.

Implementation Status – Implemented

The Water Court has recently completed several important steps in developing performance expectations for the litigation phase of the adjudication process. These have included transitioning the Water Court to a fully electronic docketing system, which should provide the ability to identify and track many of the key metrics needed to establish and monitor performance. Documentation provided by the Water Court also shows that the management team is actively engaged in an effort to identify and evaluate performance metrics for a range of activities. Examples of the types of performance metrics identified by the Water Court include timeframes/deadlines for action on cases after initial filing, age of pending cases, time elapsed between hearings and master's report or order, time elapsed between cases settlement and final

disposition, and monthly case closure rates for water masters. Although some of the metrics identified by the Water Court are specific to the adjudication of water rights, these efforts are consistent with generally accepted means of measuring performance for judicial functions/activities. Reporting to the Water Policy Interim Committee also shows the Water Court has worked to address a backlog in caseloads for the Water Judge and Associate Water Judge. Again, this demonstrates commitment on the part of the Water Court to managing the litigation phase of the adjudication process in accordance best management practices and within the parameters established by the legislature under HB 22.

RECOMMENDATION #5

We recommend the agencies begin a formal planning process for the transition to post-adjudication administration of rights by:

- A. Producing estimates of workload associated with post-decree assistance; AND,**
- B. Reviewing current staffing and resource allocations to identify where expertise and knowledge should be maintained; AND,**
- C. Coordinating post-adjudication water rights activities with legislative committees.**

Implementation Status – Being Implemented

In one form or another, all the agencies involved in the adjudication have begun addressing this recommendation. The DNRC Water Resources Division has adopted a transition plan addressing the likely future needs of the agency relative to its role in the post-adjudication administration of water rights. The transition plan includes estimates of workload associated with post-decree assistance to the Water Court in the period preceding and after the 2015 statutory deadline for completion of DNRC examination work. Through and beyond 2015, the transition plan includes analysis of likely staffing needs and estimates the number of full-time equivalent (FTE) declining from the current 47.5 to 12. Ongoing efforts to coordinate transition planning between agencies have included transferring FTE and budget authority from DNRC to the Water Court. The Water Court itself has also begun a process to review the broader implications of post-adjudication administration water rights through a judicial branch study being conducted with the University Of Montana School Of Law. Reporting on this study is likely to be available sometime in the first half of 2014. Because of the current status of the RWRCC and pending compacts with Indian tribes and the federal government, the staff and resources of this agency have not completed the initial phases of the transition as it was originally anticipated by DNRC. Assuming the RWRCC does sunset in the near future, the remaining staff and resources will be integrated into the Water Resources Division as part of a planned Implementation Bureau. As this relates to part C of this recommendation, both standing and interim committees of the legislature have been involved in the review or approval of various aspects of the transition process, including both legislation and appropriations measures.